IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1954 of 1996

with

CIVIL REVISION APPLICATION No 172 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE BANK OF SAURASHTRA

Versus

ASHIT SHIPPING SERVICES PVT. LTD.

Appearance:

1. Civil Revision Application No. 1954 of 1996
MR AS VAKIL for Petitioner
MRS KETTY A MEHTA for Respondent No. 1
MR JT TRIVEDI for Respondent No. 2

2. Civil Revision ApplicationNo 172 of 1997
MR AS VAKIL for Petitioner
MRS KETTY A MEHTA for Respondent No. 1
MR JT TRIVEDI for Respondent No. 2

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision:18/04/2001

ORAL JUDGEMENT

Both these Revision Applications arise out of one and the same order dated 30th October, 1996 passed beloe exhs. 18 and 22 in Special Civil Suit no.37 of 1996 passed by the learned Civil Judge (S.D.), Gandhidham, by which both the applications have been dismissed. Hence, both the Revision Applications are being disposed of by this common judgment.

2. M/s. Ashit Shipping Services Pvt. Ltd. (which will be hereinafter referred to as the plaintiff) filed a suit against State Bank of Saurashtra, Station road Branch, Bhavnagar (which will be hereinafter referred to as the defendant no. 1) and M/s. Vasani Brothers, Bhavnagar. (which will be hereinafter referred to as the defendant no. 2) The original plaintiff-respondent no.1 herein is a registered company engaged in the business of cleaning, forwarding, handling and stevedoring at Kandla. The defendant no. 2 is engaged in the business of timber. The plaintiff was working at the relevant time as an agent of (i) M/s. Palm Oil Transportation Pvt. Ltd. for the vessel MV "HOE ANN" at the port of Kandla. The containing the cargo arrived and was berthed at the Kandla port on 20.6.1995. The bills of lading were consigned "TO ORDER" and the notified party was the respondent no. 2. The original bill of lading and other documents were to be collected by the defendant no. 2 from the petitioner after making necessary payments. Before reaching the vessel at Kandla Port, an agent of the defendant no. 2 wrote a letter and forwarded alongwith the same the indemnity/guarantee bond which was executed by the defendant no.1 and the defendant no. 2 in favour of the plaintiff to obtain delivery of cargo without tendering the documents of title. On receipt of the said idenmity/guarantee bond dated 12th June, 1995, the plaintiff issued delivery memo dated 11.6.1993 to the agent of the defendant no. 2. The plaintiff by a letter dated 31st August, 1995 addressed to the defendant no. 1 bank demanding the original bills of lading duly discharged by the bank failing which the plaintiff threatened to invoke the indemnity bond/guarantee bond. The bank by its letter dated 16.9.1995 requesting for a copy of the indemnity bond/guarantee bond and delivery orders. The plaintiff by its letter dated 22nd

September, 1995 informed the defendant no. 1 Bank that with regard to the details of the cargo, the bank should contact the consignee or their C.H.A. directly as the plaintiff no.1 was only a shipping agent and would therefore not be in possession of all the information/documents required. Ultimately, the plaintiff served a legal notice dated 16.12.1995. The plaintiff filed the suit under the provisions of Order 37 of Civil Procedure Code on 1.5.96 praying for the judgment and decree for a sum of Rs. 22,70,369.30 ps. against both the defendants.

2. The bank-original defendant no.1 and defendant no. 2 filed their appearance in the suit and filed applications exh. 18 and 22 for leave to defend the suit unconditionally on the ground that the respondent no.1 has no lucus standi or right to file the suit in its own name as the plaintiff was only an agent for the shipping company and not agent of the party concerned or owner of the goods. The plaintiff is not entitled to receive or recover the price of the goods. The plaintiff was neither an agent of the cargo nor owner or consigner. Hence, the suit filed by the plaintiff is not maintainable. The second ground of the defendants was that the trial court has no jurisdiction to try and entertain the suit as indemnity /guarantee bond was executed at Bhavnagar. As such, the cause of action or any part therefor has not arisen within the jurisdiction of the trial court. It is also stated that the plaintiff has no cause of action to file the suit as the reading of the indemnity bond, makes it clear that the name of the plaintiff has been mentioned and the indemnity bond is only to indemnify the actual cargo owner or consigner of the goods who was actually entitled to recover the price of the goods in question and the suit is not maintainable as none of the ingredients of the said provisions are applicable to the subject matter of the suit. It is also stated that a fraud has been practised by the plaintiff and the defendant no.2 in collusion with the Manager of the bank no.1 signed the alleged indemnity bond who had no power or authority to do so and said Branch Manager has exceeded his powers and the indemnity bond appears to have been obtained by a fraud. Hence, the bond is not binding on the defendant no.1 bank.

3. The trial court after considering the material on record and the submissions made on behalf of the parties, came to the conclusion that the cargo was handed over for unloading at Kandla Port itself. As such, major part of the contract was performed at Kandla Port. Hence, the court has jurisdiction to try the suit.

The plaintiff was working as an agent of the owner of the ship and was sufficiently authorised and entitled to file a suit against the defendants. The suit of the plaintiff is covered under the provisions of sections 180 and 230(2) of the Contract Act. Therefore, the suit of the plaintiff is competent under the provisions of law. The defendant has not denied the facts that the plaintiff was working as an agent for and on behalf of the owner of the ship. Therefore, under the provisions of Section 180 of the Contract, the bailee as an owner of the cargo is having all powers to initiate the proceedings. The trial court also found that the bank has not denied that the cargo was not received by the defendant no. 2 and its price has not been paid to the consigner-plaintiff. The execution of indemnity/guarantee bond by the defendant no. 1 as a guarantor, the plaintiff was bound to accept the guarantee. The the trial court also found that there was no triable issue in existence in the suit for defendants to defend the suit. Hence, both the applications to defend the suit have been dismissed by the impugned order. Therefore, being aggrieved by the said order dated 30th October, 1996 passed by the Civil Judge (S.D.), Gandhidham, the petitioner in one revision application-original defendant no.1 and the petitioner in the other revision application-original defendant no.2 have filed both these Revision Applications.

4. The learned counsel Mr. Vakil for the defendants contended that the provisions of section 124 of the Contract Act provide that a contract by which one party promises to save the other from loss caused to him by the promissor or any other person is called a "contract of indemnity" in case a suit is based on indemnity bond for recovery of loss or breach of contract, then Regular suit should have been filed and summary suitfor recovery of loss is not maintainable. In support of his contention, he relied on the decision of the Bombay High Court in the case of Shankar Nimbaji Shintre and others vs. Laxman Supdu Shelke and others reported in AIR 1940, Bombay, 161. He also relied on the decisions of the Supreme Court in the case of Lakshman Khatik vs. The State of West Bengal reported in AIR 1974, SC, 1264 and in the case of Mrs. Raj Duggal vs. Ramesh Kumar Bansal reported in AIR 1990, SC,2218. The price of the articles in the indemnity bond is not mentioned, hence the court has no jurisdiction to take cognizance of the suit under Order 37 of Civil Procedure Code. The documents are required to be interpreted in the facts and circumstances of the case. If it is only an indemnity bond, then the suit would not be maintainable and it has to be decided as to whether the

alleged bond is an indemnity bond or guarantee. Thus, it is a triable issue. If it is a case of indemnity bond. A regular suit can be filed for breach of the contract or loss of damages. He also relied on several decisions including Lilly Kurian vs. Lewina and others reported in AIR 1979, SC, 52; Purshottam Das Banarsi Das vs. The Union of India and others reported in AIR 1967, Allahabad, 549; AIR 1988 Allahabad, 345; AIR 1992, Delhi, 1; and in the case of Hindustan Steel Workers Construction Ltd. vs. G.S.Atwal and Company (Engineers) Pvt. Ltd. reported in 1995(6) SCC, 76. The quantum of money is not mentioned in the indemnity bond. Hence, it is not a document such as a bank guarantee or a letter of credit. It is only a bill or document which cannot be relied on and that is a disputed question which is to be decided after framing an issue. Hence, a triable issue arises for determination. It is further contended that no re-joinder affidavit has been filed by the plaintiff and so it is incumbent upon the court to presume the facts mentioned in the application to be true or admitted. As the facts have not been controverted, it will be deemed to have been admitted and it is the duty of the court to grant an unconditional leave to defend the suit. He also relied on the judgment of this court in the case of Sarasvatiben Lallubhai Parikh and anotehr vs. Kantilal Purshottam Patel reported in 1964 GLR, 152. The extracts from the Banking Law by Parthasarthy 1978 Edition at page 346 to 353 and 365, 366 and Practice and Law of Banking by Sheldon, pages 489 to 496 were placed to show what are the bank guarantee letters of credit and the indemnity bond is not a bank guarantee.

5. On behalf of the respondent-plaintiff, it is contended that the indemnity/guarantee bond was executed by the bank and Vasani Brothers in favour of the plaintiff to obtain delivery of cargo without tendering the documents of title. The document mark 3/4 clearly shows that the indemnity bond was given to M/s. Ashit Shipping Pvt. Ltd. by the defendan tno.2 Vasani Brothers and the bank guarantee was given by the defendant no.1 bank to the plaintiff. M/s. Ashit Shipping Service Pvt. Ltd. issued delivery memo to the agent of defendant no. 2 Vasani Brothers, who took the delivery of cargo on the basis of the indemnity bohd/bank guarantee given by the Vasani Brothers and the State Bank of Saurashtra. A legal notice was given on behalf of the plaintiff to the defendant no.1 bank demanding bill of lading in original alongwith original delivery orders issued on the basis of the indemnity bond by M/s. Vasani Brothers and the State Bank of Saurashtra. The plaintiff has to file the suit on th basis of the indemnity

bond/bank guarantee for the liability of agreed amount of bill of lading and payable to them as delivery was taken by the agent of the defendant no.2 on the basis of indemnity bond/bank guarantee. The amount of bill of lading was agreed and there was no dispute regarding the same. Six invoices dated 30.5.95 produced at marks 3/5 to 3/10 in the suit are showing the exact amount of the goods which were demanded in the suit. The notified party to whom the bill of lading in the original and other documents were sent to " TO ORDER" and the delivery was to be given only after the bill of lading and the title documents were processed through the bank in order to secure the payment of cargo. All the title documents like bill of lading and the invoices were to be collected from the State Bank of Saurashtra by the defendant no. 2 which was within the knowledge and control of the bank and the bank was required to obtain the letter of credit in favour of the consigner party. On the basis of the indemnity bond, the cargo was unloaded and was taken away by the defendant no. 2. Subsequently the bank failed to issue necessary documents to make the payment to the plaintiff. The exact amount shown in the six invoices marks 3/5 to 3/10 was Rs. 21,08,813.32 and the suit has been filed for the recovery of the said amount with interest. The facts have not been denied in the application by the defendant no. 1 (1) that the claim of the plaintiff and the value of the invoice of the cargo (2) there is no denial regarding delivery of the goods received by the agent of the defendant no.2 on the basis of the indemnity bond and the bank guarantee (3) there is no denial regarding the execution of the indemnity/guarantee bond by the defendant. However, it is contended by the bank that the signature of the manager on the guarantee was not authorised or was obtained by a fraud, but the signature of the Branch Manager of the bank has not been denied so far. (4) There is no denial regarding the letter of agent of defendant no. 2 dated 14.6.95 enclosed with the indemnity bond in original on account of M/s. Vasani Brothers, Bhavnagar and requested to issue delivery orders for the same. (5) There is no denial regarding value of cargo shown in the bill of lading.

5. It is contended on behalf of the plaintiff that the points raised in the application for leave to defend were only for the sake of raising and were sham with a view to escape the summary procedure of the suit. He also relied on the decision of the Supreme Court in the case of Mrs. Raj Duggal vs. Ramesh Kumar Bansal reported in 1990 SC, 2218; M/s. Mechalec Engineers and Manufacturers vs. M/s. Basic Equipment

Corporation reported in AIR 1977, SC, 577 on the point that only reasonable cause to defend can be considered. Raising a sham issue cannot take out summary suit from its summary procedure.

6. I have carefully considered the contentions of the learned counsel for the parties and find that the contention of the defendants that the court has no jurisdiction to try and entertain the suit is not sustainable in the eye of law in view of the fact that the cause of action has arisen within the jurisdiction to Kandla Port Trust where the goods had arrived and were received by the defendant no. 2 on production of indemnity bond/bank guarantee given to the plaintiff at Kandla. The contention of the learned counsel for the defendants that the plaintiff has no locus standi as an agent of the consigner to file the suit is also not justified in view of the fact that the plaintiffr being an agent of consigner M/s. Palm Oil Transporters Pvt. Ltd. is justified to file the suit. Moreover, the indemnity bond/guarantee was given in favour of the plaintiff and the delivery of the goods was obtained from the plaintiff. Admittedly, the goods were received by the defendant no. 2 on the production of the indemnity bond/bank guarantee and non-payment by the bank is the cause of action for the suit. The Branch Manager has signed the indemnity bond/bank guarantee wherein it is mentioned " We, the undersigned, hereby join in the above indemnity and jointly and severally guarantee due performance of the above contract and accept all the formalities expressed therein. " It is signed by the Bank Manager as well as M/s. Vasani Brotehrs. The Bank Manager is not a peon or clerk, but he is a Branch Manager of the Bank and responsible officer of the bank who signs the guarantee taking liability of the bank for the act. Once the employee of the bank signs the guarantee, the liability of the bank for the act of its employee arises and the bank is liable in the summary suit as held in the case of The Central Railway Employees Co.Op. Credit society vs. Bank of Baroda reported in AIR 1996, Bombay, 386 and in the case of AIR 1996, Bombay, 406; R.C.Thakkar vs. Gujarat Housing Board reported in AIR 1973 Gujarat page 34. Once the bank executes the bank guarantee, the court cannot restrain the execution of such bank guarantee and should not injunct invocation of the bank guarantee if the claim was just to decide the existence or otherwise of the eventuality under which invocation of the bank guarantee could have been done. From the bank guarantee/indemnity

bond, it appears that the bank has undertaken to take all responsibilities under guarantee and the amount of cargo is a definite one. Hence, the indemnity bond/bank guarantee was justified except for taking cognizance of the suit by the trial Judge. It cannot be said at all on the basis of the indemnity bond/bank guarantee that there may be any other interpretation to show that the defendants are not liable for the price amount of the cargo. In case no rejoinder affidavit is filed by the plaintiff, the defendant's reply will not be deemed to be secresant or gospel truth. It depends upon facts and circumstances of each case where certain facts are admitted. There is no need to file a reply or rejoinder. In the present case, non-filing of rejoinder affidavit does not affect the merits of the case. As such, the

trial court was fully justified in holding that the defendants have no triable issue allegedly raised by the defendants and is nothing but a sham. Therefore, the trial court is fully justified in rejecting the applciation exhs. 18 and 22 for leave to defend.

7. Accordingly, these Revision Applications are dismissed and the order passed by the trial court is confirmed. Rule is discharged in each Revision Application with no order as to costs. Interim relief stands vacated.

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8. After pronouncement of the judgment, the learned counsel for the petitioners requested this Court to extend the interim relief granted by this Court during

the pendency of these Revision Applications for a period of four weeks to approach the Supreme Court. They also submitted that in case the interim relief is not extended, the petitioner will suffer an irreparable loss because the trial Court will immediately proceed with the matter to pass a decree after receipt of the writ of this judgment.

In the facts and circumstances of this case, I do not find any good ground to extend the interim relief granted by this Court. Accordingly, the request made by the learned counsel for the petitioners is refused. The learned counsel for the petitioners also requested this Court to direct the office to supply a copy of this judgment by 19.4.2001. The office is directed to supply a copy of this judgment to the learned counsel for the petitioner by 19.4.2002 on payment of usual charges by the petitioner.

(Kundan Singh,J)

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